79-137

IN THE SUPREME COURT
OF THE UNITED STATES

CHARLES D. STEWART
Appellant

vs.

COMMONWEALTH OF VIRGINIA
Appellee

BRIEF IN OPPOSITION TO PETITION FOR APPEAL

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TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

COMES NOW the Commonwealth in response to the Petition for Appeal herein filed by Charles D. Stewart, and states that no error was committed in the Circuit Court of Fairfax County, Virginia.

STATEMENT OF MATERIAL PROCEEDINGS

The Commonwealth agrees with the Appellant's Statement of the Case.

STATEMENT OF FACTS

The Commonwealth feels that the facts may be presented more succinctly, as taken from the transcript of the suppression motion hearing of September 8, 1978, than given in Appellants' Brief.

On June 15, 1978, Charles D. Stewart surrendered in Dade County, Florida. Stewart was confined in the Dade County jail from where, pursuant to a message given him, he telephoned Sergeant Wilson and Investigator Boggess of the Fairfax County Police Department. This conversation centered around Stewart's plans to waive extradition proceedings, the offense for which he was being held and his willingness to make a statement regarding his participation in that offense. During this conversation, Sergeant Wilson advised Stewart that he was charged with capital murder, discussed the commensurate penalties and expressed his opinion that Stewart could be convicted without the aid of his statement in evidence. (S.T. 113, 114) Stewart indicated his desire to give a statement and attempted to bargain for the guarantee of the investigators that he receive a five year sentence in return. Boggess

later stated that no such guarantees were ever made. (S.T. 132)

On June 23, 1978, Investigator Miles of the Fairfax County Police Department arrived at the Dade County jail. (S.T. 92, 93) Investigator Miles met Stewart at 10:05 A.M., informed him that Miles would be transporting him back to Fairfax County and asked him if he wanted to make a statement. Stewart stated he was not sure whether or not he wanted to talk to Miles and equivocally expressed a desire to see an attorney. (S.T. 93) Stewart then spontaneously began to make a statement concerning his whereabouts during the Scarborough killing. At this point, Miles stopped Stewart and read to him the constitutional rights required by Miranda from a standard Fairfax County Police Department warning and consent form. Stewart answered affirmatively to all questions read to him from the form by Miles. Miles then asked Stewart whether or not he wanted to make a statement. Stewart's response was to ask Miles' advice. Miles then repeated to Stewart his earlier warnings regarding Stewart's right to make a statement or to refuse to make a statement. (S.T. 95) Stewart again vascillated saying he was not sure what course of action to take. With

this response, Miles immediately ceased his inquiry and advised Stewart of his plans to return later in the day. (S.T. 95)

At 2:00 P.M. the same day, Miles returned to the jail, picked up Stewart and drove him to the airport where he was secured in a holding cell until the plane's departure. While at the airport, Miles told Stewart that Clark, the other murderer, had been arrested in California and that he had given a statement. Miles discussed no details of the statement with Stewart. (S.T. 96)

During the flight, Stewart expressed a desire to give a statement to Investigator Boggess. Investigator Miles assured Stewart he would arrange to have Boggess present upon their return. No other topics pertinent to the charge were discussed on the flight. (S.T. 98)

While Miles was booking Stewart at Fairfax County Police Headquarters building, Boggess arrived. While at police headquarters, Stewart voluntarily agreed to accompany both detectives to their office at Criminal Investigations Division

(located in a nearby building), (S.T. 99) Once in the office, Stewart called his father and subsequently read and signed a standard warning and consent form. (S.T. 108) Stewart specifically declined to speak with an attorney and readily consented to give a statement. (S.T. 106)

The warning and consent form was signed by Stewart at 9:32 P.M. and the interview ended at 11:40 P.M. (S.T. 108, 109) Stewart read each page as it was typed, made necessary corrections, inititaled each page and noted the time of 1:36 A.M. on each page. (S.T. 110). Stewart made approximately forty-five corrections in the sixty-one page statement. (S.T. 82, 83) During the session, Stewart never indicated that he was tired and was offered coffee or coke to drink. (S.T. 110) Investigator Miles testified that the tape was only turned off to change a tape or to save tape during long pauses. (S.T. 105) Investigator Boggess testified that all important parts of the statement were on the tape and further testified that the tape may have been stopped once or twice to clarify a point. (S.T. 126-130)

The statement made by Stewart concluded on the last page of his confession is the result of a discussion between Boggess and Stewart. Stewart wanted the detectives to guarantee that his statement would help him in his trial. (S.T. 131,132) Both detectives told Stewart that his statement could help him or hurt him at trial. In response to this, Stewart composed and read into the tape the statement on the last page. (S.T. 132)

ARGUMENT

The crucial issue for decision in the case at bar is the voluntariness of the Petitioner's confession. He would have this Court believe that his confession was induced by implied coercion and therefore, wrongfully admitted into evidence by the trial court. The Petitioner would attempt to persuade this Court through a lengthy brief citing numerous cases which touch the constitutional substantive law of confessions. These cases, however, fail to address the issue of how much weight is to be accorded to the trial court's finding of voluntariness.

The Commonwealth submits that in spite of the Petitioner's exhaustive

study, he has failed to cite the recent decision by this Court which is directly on point. Every point in the decision in Witt v. Commonwealth, 215 Va. 670 (1975) is paralleded by similar points in the case at bar.

First, the issue in Witt was whether or not the defendant's confession was induced by implied coercion.

Second, the evidence presented at the suppression motion in Witt, as in this case, was in conflict. The testimony of the Petitioner materially differs from the testimony of the police investigators.

Finally, a source of the alleged coercion in both cases was the defendant's perception of an unsupported implication by the police that a third person (in Witt, defendant's wife and in this case, Petitioner's girlfriend) could be arrested if the defendant did not confess.

In Witt, as in this case, the trial court found the confession to be voluntary and thus admitted it into evidence. This Court then held that the voluntariness of a confession must

be proven by a preponderance of the evidence, and further held that the trial court must determine from the evidence whether the confession was freely and voluntarily given.

This Court went on to present these guidelines to the trial court:

> In determining whether the Commonwealth has met its burden, the trial court, acting as fact finder, must evaluate the credibility of the witnesses, resolve the conflicts in their testimony, and weigh the evidence as a whole. Its factual finding is to be given the same weight by the appellate court as is accorded the finding of fact by a jury. Factual findings of voluntariness are not disturbed on review unless plainly wrong.

In this case, as in Witt, the suppression hearing was extensive. For more than four hours counsel examined the Petitioner and both investigating police officers. There is no doubt that some of the evidence was in dispute, but in the end, the trial court judge resolved

discrepancies in favor of the Commonwealth. ". . .I find certain portions of the defendant's testimony to be apparently incredible." (S.T. 137) "On the basis of the credibility of the witnesses, I find that this statement was given in a voluntary manner after proper warning and it was not forced nor were any promises or inducements given." (S.T. 138)

CONCLUSION

The Commonwealth agrees that the issue here is voluntariness of the statement. The trial court examined all relevant testimony and decided that the statement was freely given, and because of the holding in Witt, the trial court's ruling should not be disturbed unless plainly wrong.

Respectfully submitted,

Robert F. Horan, Jr.
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I, Robert F. Horan, Jr., Commonwealth's Attorney for Fairfax County, Virginia, and duly qualified to practice in this Court, hereby certify that a copy of this Brief in Opposition was mailed to John Frank Leino, Esquire, 128 N. Pitt Street, Alexandria, Virginia 22314, this 16th day of October, 1979.

Robert F. Horan, Jr.